

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-6033

United States Court of Appeals

FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

—v.—

AMERICAN EXPRESS COMPANY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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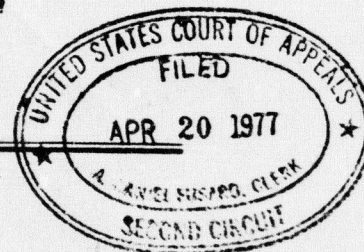


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6033

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

-v-

AMERICAN EXPRESS COMPANY,

Defendant-Appellant.

On Appeal From the United States District Court
For the Southern District of New York

APPELLANT'S BRIEF

ISSUE PRESENTED FOR REVIEW

Whether, despite the Congressional policy against
duplication of suits under Title VII, the District Court
has jurisdiction of a civil action by the Equal Employment

Opportunity Commission jurisdictionally based on the same charge of discrimination as a prior suit by the charging party which has already terminated by settlement?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York (Goettel, J.) denying defendant's motion to dismiss the complaint.* The action arises under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.**

Defendant American Express Company ("the Company") moved to dismiss on the ground, among others, that Title VII bars the Equal Employment Opportunity Commission from maintaining a second action against the Company based on the same charge of discrimination as a private action against the Company by its former employee, the charging

* This Court's jurisdiction to hear the appeal under the Cohen doctrine is the subject of a pending motion to dismiss, the consideration of which has been deferred to the argument on the merits. The jurisdictional issue is dealt with in the briefs on the motion.

** The pertinent portions of Title VII are attached as an Appendix to this brief.

party (7a).^{*} The Company's motion was founded upon the strong policy in Title VII against the duplication of private and EEOC actions based on the same charge of discrimination. The six Courts of Appeals which have thus far passed on the issue have divided evenly. It is a question of first impression in this Court.

INTRODUCTION

Originally, Title VII of the Civil Rights Act of 1964 authorized suit on a charge of discrimination only by the employee aggrieved. The Equal Employment Opportunity Commission had authority only to investigate charges of discrimination filed with it and to attempt to conciliate those as to which it found probable cause.

* The Company also moved to dismiss on the ground that the action is barred by the 180-day time period in §706(f)(1) of Title VII and by the applicable 3-year state statute of limitations, and on the ground of laches (7a). The Court denied the motion based on the 180-day period and the statute of limitations, with leave to renew after the Supreme Court's decision in EEOC v. Occidental Life Insurance Co., 535 F.2d 533 (9th Cir. 1976), cert. granted, U.S. (December 13, 1976). The Court also denied the Company's application based on laches but held the Company "may be entitled to some mitigation of damages because of laches" (84a).

In 1972, Congress amended Title VII and authorized the EEOC itself to institute judicial proceedings to enforce Title VII. It decided, however, to retain the private cause of action as well, to enable employees to avoid administrative delay and obtain prompt relief on their own. Congress recognized, as the amended statute and its legislative history show, that if both the employee affected and the EEOC could bring suit on the same charge of discrimination, burdensome and wasteful duplication of suits would result. All are agreed that Congress prohibited duplication of suits.

The parties, and the Courts of Appeals, disagree, however, as to what is meant by duplication. When the EEOC is dissatisfied with the scope of the issues raised or the relief sought or obtained by the private plaintiff, in litigation or by settlement, may it bring a second suit on the same charge raising broader issues or seeking more extensive relief than the private plaintiff?

Defendant contends, and the Eighth, Ninth and Tenth Circuits agree, that in such cases the EEOC may not circumvent Congressional policy by simply bringing a second suit, as it has done here. Congress has provided

ample remedies which enable the EEOC to protect the public interest where it believes that a private plaintiff may not, or has not, done so. These remedies do not involve the problems of duplication, harassment of employers or interference with the employee's ability to litigate and settle his own claim, that arise if the EEOC is permitted to re-litigate the same charge of discrimination on somewhat different or broader grounds.

First, in full recognition of the public interest in the conduct of Title VII litigation and still avoiding duplication of suits, the EEOC is given the exclusive right to bring, and thus maintain primary control of, any suit on the employee's charge of discrimination for 180 days after it is filed, §706(f)(1) of Title VII. During this period the employee involved must await the outcome of the EEOC's investigation and conciliation efforts and the result of its decision whether or not to bring suit. If the EEOC brings suit, the employee may intervene as of right in the EEOC action, but may not bring a private suit, thus assuring that all claims arising from his charge will be resolved in a single litigation.

If the Commission dismisses the charge or simply fails to take action for more than 180 days, as in

the present case, it must notify the charging party, who then receives a "right to sue" letter and may then bring a private action.

Second, even after a private action is instituted, the EEOC may still participate in the litigation to represent the public interest without the necessity of a second action. "[U]pon certification [by the EEOC] that the case is of general public importance," the Court "may in its discretion permit the Commission ... to intervene," enlarge the issues or demands for relief and prevent a settlement which it does not approve, §706(f)(1). The EEOC had knowledge of the private action here, participated as amicus curiae, but never sought to intervene during the 1 1/2 years it was being litigated.

Third, if it fails to do either of the above, the EEOC is precluded only from using the charge filed by that plaintiff as the basis for its own suit. If the acts involved are believed by the Commission to be of a continuing nature, any member of the Commission may himself file a charge against any further acts or practices which remain unremedied despite the private action, or the EEOC may act on charges filed by other employees as to such acts, §706(b). The EEOC has

done neither here.

Finally, if the EEOC believes that an employer's violations of Title VII are systemic and it can demonstrate that the employer is "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title," it may bring an action to obtain relief against such violations under §707, without being limited to particular acts of discrimination and related practices. Although it has claimed that the Company is guilty of pervasive acts of discrimination, the Commission has not brought a "pattern or practice" suit against it.

The Commission has never adequately explained why it has not availed itself of any of these clear remedies here. It has referred, as its reasons for not doing so, only to its own internal administrative delays in processing new charges and its lack of confidence in its ability to obtain adequate relief from the District Court as an intervenor in the private action.

A much more likely reason, however, is that by using a charge filed in 1971 as the jurisdictional basis for this suit, the EEOC seeks the in terrorem effect of huge back pay liability which would be unavailable if it

relied on more recent charges. Title VII provides that back pay may be awarded for a period beginning two years before the filing of the charge which gives rise to the suit, §706(g).

Having delayed so long that it lost the opportunity to bring its own action on the Ferrell charge of discrimination or to intervene in the charging party's private action while it was still pending, the Commission is attempting to evade the statute of limitations as it would apply to any new charges or §707 suits. It relies instead on a stale, once litigated charge in order to claim back pay for eight years beginning with 1969. Denying the Commission the right to sue again on that charge will prevent this abuse of the statute. It will not, in any manner, hinder the Commission from seeking relief, by means of the remedies outlined above, against any recent discriminatory practices of which it believes defendant guilty. The public interest in obtaining redress for, or preventing their continuance, will not be impaired in any way.

STATEMENT OF FACTS

On June 16, 1969 Clarence Ferrell, a Black who was born in the United States, was hired by the Company as an assistant customer representative in the New York

office of the Company's Card Division. Ferrell's supervisor was a Black West Indian. On June 11, 1971 Ferrell's supervisor discharged him because of poor job performance and excessive lateness and absenteeism (33a).

The Complaint Filed with the New
York State Division of Human Rights

On June 25, 1971 Ferrell filed a complaint with the New York State Division of Human Rights alleging that he was discharged because of his race. On July 29, 1971 the Division of Human Rights, having investigated the complaint, issued a determination and order dismissing the complaint for lack of probable cause (12a).

The Charge of Discrimination
Filed with the EEOC

Ferrell filed a charge of discrimination with the EEOC on June 14, 1971 (14a). He claimed in his amended charge that he was discriminated against in the "terms and conditions of employment" (work assignments and discipline) and wrongfully discharged because his Black West Indian supervisor was prejudiced against him and other Black Americans (15a).

The EEOC Determination

The EEOC did not issue any determination on

Ferrell's charge of discrimination until 1 1/2 years after the charge was filed. On January 17, 1973, professing to accord substantial weight to the contrary action of the State Division (16a), the EEOC made a reasonable cause determination (16-19a). It analyzed the attendance records of Ferrell and the 20 other employees in the same supervisory unit, investigated the performance standards in the unit as they related to the derelictions of which Ferrell was accused, and concluded that the attendance and performance standards which Ferrell's Black West Indian supervisor applied to Ferrell, a native Black, were different from those which he applied to Ferrell's Caucasian and Black West Indian co-workers, and that there was, more generally, a disproportionately high number of Blacks discharged for poor attendance and lateness. With respect to the terms and conditions of employment, as distinguished from discharge practices, the EEOC found no evidence of discrimination by Ferrell's supervisor (17-19a).

The EEOC also stated that too few Blacks were employed by the Company in supervisory and managerial positions and that a disproportionate number of them were of West Indian origin. It is also "noted" that the Company's employment application form in use in 1971 and 1972 asked for information about arrests and wage garnishments (19a).

The EEOC's Failure to Bring Suit

The EEOC's conciliation efforts with respect to Ferrell's charge were completed by April 5, 1973 (72a). It had the right at any time thereafter to commence its own suit under §706(f)(1) and thus to control the scope and course of any litigation brought on the Ferrell charge. It did not do so. Instead it issued to Ferrell, at his request, a notice of right to sue on July 3, 1973 (20a), more than two years after the filing of his charge of discrimination.

The Private Action

On September 20, 1973 Ferrell commenced his own Title VII action against the Company in the United States District Court for the Eastern District of New York (Clarence M. Ferrell v. American Express Co., 73 C 1419). Ferrell's complaint was based on the same charge of discrimination which he had filed with the EEOC and which is the jurisdictional basis for most of the allegations of the complaint in this case. Ferrell's complaint alleged that different standards were applied to him than to similarly situated whites and Black West Indians, and that his discharge by the Company was the result of "the policies and practices pursued by defendant" (21-25a).

Litigation and Settlement
of The Private Action

The Company moved for summary judgment in the Ferrell action on the ground that Ferrell's charge of discrimination had already been adjudicated, and dismissed for lack of probable cause, by the State Division of Human Rights (26a). As previously stated, the EEOC had the right to move to intervene in the Ferrell action if it wished to broaden the issues or relief sought, or to participate in the control of the litigation and of any settlement which Ferrell and the Company might agree upon. It did not do so.

It chose instead to enter the action only as amicus curiae on February 21, 1974 by filing a brief in opposition to the Company's motion for summary judgment (26a). On July 17, 1974 Judge Judd denied the motion on the ground that the doctrines of res judicata and collateral estoppel were not applicable because of the federal policy in favor of allowing employees to prosecute their Title VII complaints in the federal courts. Ferrell v. American Express Co., 8 FEP Cases 521 (E.D.N.Y. 1974).

The Company filed its answer to Ferrell's complaint on August 23, 1974 (32a). Discovery proceedings

followed. The action was settled one year and eight months after it was commenced. A stipulation of discontinuance with prejudice was so ordered by the Court on May 5, 1975 (39a). Although the EEOC was of course aware of the case as a result of its issuance of a right to sue letter and its participation as amicus curiae, it made no attempt to prevent or discourage the settlement (77a).

When the Ferrell action was finally settled, it had been pending, with the EEOC's knowledge, for almost two years, and the charge of discrimination which Ferrell had filed with the EEOC in June, 1971 had been pending with the EEOC for almost four years. The EEOC's investigation of the charge had been completed on or before January 17, 1973 (16a), more than two years prior to the settlement.

At no time prior to the Ferrell settlement, in the four years during which the charge was on file with and under investigation by the EEOC, did the EEOC (i) bring its own action against the Company on the Ferrell charge (which it had the exclusive right to do for 180 days after the charge was filed)*, or (ii) move to intervene in the

* Actually the EEOC did not obtain the right to bring its own action against the Company until 180 days after it obtained the general authority to sue under the March 1972 amendments of Title VII (P.L. 92-261, effective March 24, 1972). Prior to the 1972 Act, the EEOC had no enforcement powers and was limited to conciliation efforts. See Argument, infra.

Ferrell action on the ground that the charge raised issues of "general public importance," or (iii) bring an action against the Company on the basis of a charge filed by a member of the Commission or by an employee of the Company other than Ferrell, or (iv) institute a "pattern or practice" suit pursuant to §707 of Title VII.

The Complaint in This Action

The EEOC's complaint in the present action was filed January 21, 1976 but was not served on the Company until April 9, 1976 (10a). That was almost five years after the Ferrell charge of discrimination was filed and almost a year after the Ferrell action was finally settled. The EEOC alleged in the complaint, in the broadest, most sweeping terms, that the Company has, "at its New York City and Washington, D.C. facilities," engaged in unlawful employment practices "since July 2, 1965, and continuously up until the present time" in almost every aspect of its business, "including, but not limited to," its recruitment, hiring, promotion and discharge practices and policies (4a) (emphasis added). The EEOC seeks injunctive relief, back pay awards for adversely affected individuals, and related relief (5a).

As to the administrative charges jurisdictionally required for suit, the complaint alleged only that unspecified "persons claiming to be aggrieved [had] filed charges with the Equal Employment Opportunity Commission..." (4a). Although it was not disclosed in the complaint, the EEOC has since conceded that the only purported jurisdictional bases for this action are the charges filed with the EEOC by Ferrell in New York City and by Mary A. Reese in Washington, D.C.* The EEOC stated below that "the complaint was jurisdictionally based on the filing of two charges, one filed by Clarence M. Ferrell and the other by Mary Reese" (73-74a).

The enormous burden and expense to the Company of defending this second litigation arising out of the Ferrell charge is shown by the EEOC's first set of interrogatories, as well as by the vague, sweeping allegations of the complaint. The interrogatories (47-71a) demand detailed, voluminous information from the Company with

* The Reese charge and the allegations of the complaint as to defendant's Washington, D.C. offices are not involved in this appeal. They are separate from, and unrelated to, the Ferrell charge and the New York City allegations based upon it, and are fully discussed in defendant's memorandum (pp.5-7) and supplemental memorandum (p.2) in opposition to the motion to dismiss this appeal.

respect to virtually all of its employment practices and policies over the entire period from 1960 through 1976. The EEOC's initial discovery demands include almost all conceivable data as to the Company's hiring, promotion, discharge and other employment practices for thousands of employees for the 16 years from 1960 through 1976, including all names, dates and other specifics as to all applicants for employment, employees and former employees in the Company's New York City units, divisions and departments.

The Ruling Below

On June 1, 1976 the Company moved to dismiss the complaint to the extent it is based on the Ferrell charge, on the ground that the EEOC may not maintain a second action on a charge of discrimination previously litigated in a private action (7a). The District Court denied the Company's motion in an opinion dated January 6, 1977 (75a).

The Company requested certification of an interlocutory appeal pursuant to 28 U.S.C. §1292(b) in view of the 3-to-3 split among the Circuits on this issue. The District Court denied that request. The Company filed its notice of appeal on February 15, 1977 (88a).

ARGUMENT

THE EEOC MAY NOT MAINTAIN A SECOND ACTION ON A CHARGE OF DISCRIMINATION WHICH HAS ALREADY BEEN THE SUBJECT OF A PRIVATE ACTION

There are competing policy considerations in determining whether the EEOC may maintain a Title VII action against an employer after an independent action based on the same charge has been commenced by the aggrieved employee. Duplication of litigations must be avoided. The private individual must be protected from interference with his right under Title VII to prosecute and/or settle his claim on his own if the EEOC has delayed unduly in enforcing it. The employer must be protected from being forced to litigate two lawsuits based on the same charge of discrimination. The EEOC is, however, charged with overall enforcement responsibility under Title VII, and obviously is interested in the nature of the issues litigated in private Title VII actions, the type and scope of relief sought, and the terms of settlements made with employers.

The enforcement scheme adopted by Congress in amended Title VII, the legislative history and the decided

cases show that the accommodation of these competing policy considerations does not require the courts to permit multiple litigation to resolve a single charge. Congress provided the EEOC with an arsenal of other procedural remedies, which do not involve the problems of duplicative suits, to eradicate employment discrimination.

A.

The Title VII Enforcement Scheme

Under the enforcement scheme of Title VII, EEOC and private suits on the same charge are limited to the same or similar factual allegations. Congress intended that litigation in the federal courts was to be used only as a "last resort" to achieve compliance with Title VII. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Weise v. Syracuse University, 522 F.2d 397, 411-412 (2d Cir. 1975); and EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 947-948 (8th Cir. 1974). Before that final recourse, state civil rights agencies must be given an opportunity to redress an employee's grievance, §706(c) and (d); and, failing prompt state action, the EEOC must investigate any complaint of violations, determine whether there is probable cause to support it and, if so, attempt to conciliate and settle it, §706(b). Only if these preferred remedies fail, can an action in the federal courts be instituted, §706(f)(1).

It is therefore fundamental under Title VII that there cannot be a federal civil action pursuant to §706 unless a "charge of discrimination" has been filed by an aggrieved individual or by a member of the EEOC, referred to an appropriate state agency, investigated by the EEOC in an administrative proceeding, and been the subject of conciliation procedures designed to resolve the charge. Because of the importance of these procedures in implementing the Congressional policy outlined above, they have been held to be jurisdictional requirements. See, e.g., EEOC v. Hickey-Mitchell Co., supra, at 947; EEOC v. Griffin Wheel Co., 12 FEP Cases 523, 525 (N.D. Ala. 1976).

The charge is thus crucial to Congress' "last resort" policy. The charge and the EEOC findings which result from its investigation of the charge -- to the extent "reasonably related" to it -- define the claims which have been the subject of the required administrative proceedings. Any civil action which is brought pursuant to §706 must therefore be limited to such matters. Any suit not based on a charge, or which goes beyond its reasonable scope, is jurisdictionally defective. See, e.g., Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465-466 (5th Cir.

1970); Tipler v. E. I. duPont de Nemours and Co., 443 F.2d 125, 131 (6th Cir. 1971); Oubichon v. North American Rockwell Corp., 482 F.2d 569, 571 (9th Cir. 1973); and Jenkins v. Blue Cross Mut. Hosp., 538 F.2d 164, 167 (7th Cir. 1976).

These are not mere technicalities. These requirements and limitations implement important Congressional policies governing the enforcement of Title VII.

Thus, under the Title VII enforcement scheme which Congress adopted, the charge of discrimination, and the EEOC's determination on that charge, define and delimit the scope of the issues which may thereafter be litigated. The requirements are the same regardless of whether it is the EEOC or the charging party who commences litigation. The scope of the action permitted is also the same whichever party commences suit.

B.

The Legislative History of the
Title VII Amendments

Since the 1972 amendments to Title VII authorized the EEOC to institute actions under §706, and such suits have the same permissible scope as private actions

already authorized, Congress gave extensive consideration to the interrelationship of the two rights of action.

The legislative history of the 1972 amendments shows two major Congressional concerns -- that there should not be duplicative actions, one by the private party and one by the EEOC, and that while the EEOC should in the first instance have the right to commence and control the litigation, a private party should be freed from the consequences of excessive EEOC delay by being authorized at some point to commence and control his own litigation.

In the debates preceding the 1972 amendments, the desirability of adding EEOC enforcement authority to the previously existing private cause of action was not seriously challenged. As Senator Javits stated, "There is substantial agreement on the need to put teeth into Title VII by granting the Commission some sort of enforcement power. The only issue really before us is what kind of enforcement power shall it be." 118 Cong. Rec. 580 (Jan. 20, 1972); Legislative History of the Equal Employment Act of 1972, Senate Committee on Labor and Public Welfare, Nov. 1972 (hereafter "Leg. Hist.") 645.

The bills initially introduced in the 92nd Congress would have granted the EEOC cease-and-desist authority. The EEOC would have been empowered, in much the same manner as the NLRB, to issue complaints, conduct administrative hearings and, where lawful employment practices were found, to issue appropriate enforcement orders subject to review by the federal appellate courts. See H.R. 1746, 92nd Cong., 1st Sess. (1971), at 2-13; Leg. Hist. 33-44; and S. 2515, 92nd Cong., 1st Sess. (1971), at 3-16; Leg. Hist. 159-172.

After vigorous debate,* Congress enacted into law an alternate scheme under which Title VII enforcement is a judicial, rather than an administrative, function. See, e.g., remarks of Representative Quie (117 Cong. Rec. 31962 (Sept. 15, 1971); Leg. Hist. 200), and remarks of Representative Perkins (117 Cong. Rec. 31960 (Sept. 15, 1971); Leg. Hist. 195-196).

* See, e.g., 117 Cong. Rec. 31959 (Sept. 15, 1971) (remarks of Rep. Martin), Leg. Hist. 193; 117 Cong. Rec. 31979-81 (Sept. 15, 1971) (remarks of Rep. Erlenborn), Leg. Hist. 247-49; 118 Cong. Rec. 933 (Jan. 24, 1972) (remarks of Sen. Thurmond), Leg. Hist. 810-11; 118 Cong. Rec. 2861-62 (Feb. 7, 1972) (remarks of Sen. Dominick), Leg. Hist. 1346-47; see index to Congressional debates over EEOC enforcement powers, Leg. Hist. IX-X.

Primacy of the Individual Right of Action

The 1972 amendments retained the private cause of action created by §706(e) of the 1964 Act -- the allegedly aggrieved individual's right to pursue his own remedy by litigation or settlement with the employer. This right would be seriously undermined if settlement of the private action did not preclude further proceedings on the individual's charge by the EEOC. Employers would obviously be reluctant, if not wholly unwilling, to settle such litigation if the settlement accomplished nothing more than a temporary truce.

Congress repeatedly stressed, in 1971-1972, that the newly-enacted enforcement authority given to the EEOC should not be allowed to detract from the private individual's overriding right to control the litigation and dispose of his own charge of discrimination. The House Report on H.R. 1746 stated:

" . . . [T]he private right of action . . . provides the aggrieved party a means by which he may be able to escape from the administrative quagmire The primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." House Report No. 92-238, 92nd Cong., 1st Sess. (June 2, 1971), (hereafter "House Report"), at 12-13; Leg. Hist. 72-73 (emphasis added).

The Senate Report on S.2515 stated:

" . . . [T]he aggrieved person should be given an opportunity to escape the administrative process when he feels his claim has not been given adequate attention The primary concern should be to protect the aggrieved person's option to seek a prompt remedy." Senate Report No. 92-415, 92nd Cong. 1st Sess. (Oct. 28, 1971) (hereafter "Senate Report"), at 23-24; Leg. Hist. 432-433.

An analysis explaining the Joint Conference Committee version of the Title VII amendments made it clear once again that Congress intended to "allow the person aggrieved to elect to pursue his or her own remedy . . . where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution [A]s the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief." 118 Cong. Rec. 7168 (March 6, 1972); Leg. Hist. 1847 (emphasis added).

The Congressional Intent to
Avoid Duplication of Actions

Congress intended, as well, to prevent the newly-created EEOC enforcement authority from harassing employers with the burdens of having to litigate two separate

proceedings -- one by the private party, one by the EEOC -- based on the same charge of discrimination. Congress' concern with avoiding duplication of proceedings (whether administrative or judicial) was evident from the outset.

In its report dated June 2, 1971, the House Committee on Education and Labor recognized the problems inherent in the "interrelationship between the newly created cease and desist enforcement powers of the Commission and the existing right of private action." The Committee concluded summarily that "duplication of proceedings should be avoided." House Report, at 12; Leg. Hist. 72.

The Senate Report of October 28, 1971 expressed the same concern about the "interplay between the newly created enforcement powers of the Commission and the existing right of private action," and likewise concluded that "duplication of proceedings should be avoided." Senate Report, at 24; Leg. Hist. 433.

Indeed, in the early versions of the 1972 amendments, which contemplated administrative cease-and-desist proceedings as the EEOC enforcement authority, both Houses specifically included provisions "for cutoff of the Commission's jurisdiction once the private action has been filed -- except for the power to intervene -- as well as a cutoff of the right of private action once the Commission

issues a complaint or enters into a conciliation or settlement agreement which is satisfactory to the Commission and the aggrieved individual." Senate Report, at 24; Leg. Hist. 433 (emphasis added). See also, House Report, at 12; Leg. Hist. 72.

A provision expressly cutting off EEOC "jurisdiction" did not appear in the final versions of the bill, which deprived the EEOC of administrative enforcement jurisdiction and substituted a right in the EEOC to sue in court. However, the bar against duplicative proceedings remained basic to the legislation. Throughout the months of debate over what the proper Title VII enforcement scheme should be, there does not appear to have been a single challenge in either House to the Committee statements that duplicative proceedings would be prohibited. Our examination of the legislative history does not disclose any legislator's suggestion that the EEOC had the right, or should have the right, to initiate suit or bring administrative proceedings after an action on the same charge has been commenced by the charging party.

When the Senate was debating the wording of the amendment sponsored by Senator Dominick which eliminated

cease-and-desist authority and substituted the EEOC's right to bring a lawsuit, Senator Javits suggested that the amendment provide that if the Commission is unable to secure a "conciliation agreement acceptable to the Commission, the Commission shall bring a civil action" 118 Cong. Rec. 1067 (Jan. 25, 1972); Leg. Hist. 889 (emphasis added). Senator Dominick expressed concern that the EEOC's discretion to file or not to file an action would thereby be lost. He suggested that "may" be substituted for "shall." 118 Cong. Rec. 1068 (Jan. 25, 1972) Leg. Hist. 891-892.

Senator Javits emphasized the primary importance of the private party's right to "cutoff" the Commission's jurisdiction after a reasonable time for conciliation efforts. He argued that:

"[I]f we change the word 'shall' to 'may,' do we not have to have some cutoff time as far as the Commission is concerned, with respect to its exercise of that discretion in bringing a civil action . . . Would not the Senator agree that if we are going to adopt that suggestion, that we leave it at 'may,' we have to put some termination date upon the Commission itself so that the complainant may sue without necessarily sitting around waiting 6 months." 118 Cong. Rec. 1069 (Jan. 25, 1972); Leg. Hist. 893 (emphasis added).

The bill which was finally adopted used the word "may," thus granting the EEOC discretion whether to sue. In deference, however, to the concern expressed by Senator Javits over allowing the EEOC to sue during an unrestricted period of time, the final version of the bill granted the charging party the absolute right to commence an independent action if the EEOC has not brought suit after the expiration of 180 days from the filing of the charge, and by obvious implication, thereby to "cutoff" the EEOC's authority to do so. See 118 Cong. Rec. 1069 (Jan 25, 1972); Leg. Hist. 894.

The section-by-section analysis of S.2515 which was introduced by Senator Williams thereafter -- and immediately before the Senate vote in favor of the final version of the bill -- reiterated that "In providing for the individual right to sue in the event that action by the Commission is unsatisfactory or unresponsive, it is not intended that the duplication of proceedings should be allowed." 118 Cong. Rec. 4941-42 (Feb. 22, 1972); Leg.

Hist. 1772 (emphasis added).*

The enforcement scheme ultimately adopted was summarized as follows in the Joint Explanatory Statement on H.R. 1746:

"Aggrieved parties . . . may bring a private action if the Commission . . . has not brought suit within 180 days or the Commission has entered into a conciliation agreement to which such aggrieved party is not a signatory. The Commission . . . may intervene in such private action." Joint Explanatory Statement on Managers at the Conference on H.R. 1746, 92nd Cong., 2d Sess., 17-18 (1972); 1972 U.S. Code Cong. & Admin. News. at 2182; Leg. Hist. 1815-16.

The Third Circuit, which has concluded that the EEOC can bring suit even after the commencement of a private action, relies upon the absence of a reference

* Senator Williams had stated on the floor of the Senate on January 19, 1972:

"In any event, duplication of proceedings is avoided by termination of one at the commencement of the other. For example, if any individual should perfect and exercise his Title VII right of court action, the Commission would thenceforth be divested of jurisdiction over the matter. Likewise, if the Commission issued a complaint and proceeded with reasonable speed, its jurisdiction would remain exclusive prior to the institution of enforcement or review proceedings in the court of appeals. The committee concluded that this scheme would protect aggrieved persons from undue delay, as well as prevent respondents from being subject to dual proceedings." 118 Cong. Rec. 295 (Jan. 19, 1972); Leg. Hist. 587 (emphasis added).

to duplicative actions in a section-by-section analysis* later than the one previously cited. EEOC v. North Hills Passavant Hospital, 544 F.2d 664, 672 (3d Cir. 1976). But the Tenth Circuit has stated in response to the Third Circuit's reliance upon the "omission":

"We would hesitate to conclude that because the problem was not mentioned in certain portions of the analysis it was not a concern of Congress. One could as easily infer from the absence of discussion on the point that the legislators were assured they had eliminated the problem by inclusion of the provision for EEOC intervention." EEOC v. Continental Oil Co., 548 F.2d 884, 890 (10th Cir. 1977).

Permissive Right of Intervention
to Reconcile Competing Interests

The grant to the EEOC in the enacted version of the Title VII amendments of a permissive right of intervention was the way in which Congress balanced the "paramount" right of the individual to control the outcome of his case,** and the requirement that duplicative actions

* 118 Cong. Rec. 7166-69 (March 6, 1972); Leg. Hist. 1844-51.

** See 118 Cong. Rec. 7168 (March 6, 1972); Leg. Hist. 1847.

be avoided, with the need for effective Title VII enforcement by the EEOC. As pointed out earlier, when the EEOC decides against bringing an action, or has made no decision, and notifies the individual of his right to sue pursuant to §706(f), it still may seek intervention in the private action if it believes, for example, that the case involves broader issues than those raised by the employee, or there is a need for broader or different relief, or a prospect of a settlement between the employee and employer which would not be in the public interest.

In the present case, the EEOC made no attempt to intervene in the private action. Instead, it purported to commence its own action almost two years after the commencement of the private action.

"Primary reliance [must be placed] on the construction of the language of the statute to avoid surplusage." EEOC v. Continental Oil Co., supra, at 890. Under §706(f)(1) of Title VII, the EEOC is allowed to intervene in a private action only if it can certify that the action is of "general public importance," and then only in the discretion of the trial court. These substantial

restrictions on the right of intervention, see also Fed. R. Civ. P. 24(b), are mere surplusage if the EEOC can circumvent Congress' intentions by ignoring the intervention remedy and filing its own action on the same charge of discrimination. That was not, and cannot have been, the Congressional intent.

C.

The Relevant Case Law

The Decisions Barring Duplicative Actions

As previously stated, three Circuits have held, in accordance with the Company's position in this case, that the EEOC may not maintain an action under §706 based on the same charge of discrimination which was the jurisdictional basis of a private action commenced by the charging party.

The first appellate court which considered the question was the Eighth Circuit. In EEOC v. Missouri Pacific R. Co., 493 F.2d 71 (8th Cir. 1974), the charging party had brought a private class action which was limited to the racially discriminatory effect of the use of arrest and conviction records as

a basis for hiring decisions. The EEOC, dissatisfied with the limited character of the private action, brought an independent second action on the same charge, alleging other racial discrimination with respect to hiring and other matters.

The Eighth Circuit affirmed a dismissal of the EEOC action. It held that the statutory scheme of enforcement and the legislative history evidencing Congressional concern over "duplicitous suits" required the conclusion that the prosecution of a private suit must "preclude the later filing of an action by the Commission grounded upon the charging party's complaint and seeking to enlarge and broaden the issues." (at 73)

The Court said:

"The scheme of the statute itself, as thus described, negates the Commission's double-barreled approach. Once either the Commission or the charging party has filed suit, §2000e-5(f) (1) speaks only in terms of intervention - the absolute right of the charging party to intervene if the Commission elects to file suit within 180 days; the permissive right of intervention on the part of the Commission in the private action. The statute cannot be read to warrant duplicitous lawsuits when both actions find their genesis in one unlawful employment practice charge." (at 74)

In addition to intervention as a means of protecting the public interest, the Commission had also acquired the authority, the Court pointed out, to bring pattern or

practice suits, "thereby strengthening its enforcement arsenal." (at 75 n.2) See also Tuft v. McDonnell Douglas Corp., 517 F.2d 1301, 1306 n.9 (8th Cir. 1975), cert. denied, 423 U.S. 1052(1976), in which the Eighth Circuit reaffirmed its decision in Missouri Pacific.

In EEOC v. Pacific Press Publishing Ass'n, 535 F.2d 1182 (9th Cir. 1976), the second appellate decision in the Company's favor, the EEOC sought a preliminary injunction under §706(f)(2) to restrain an employer from discharging two employees in alleged retaliation for their filing charges of discrimination with the EEOC. One of the employees had previously received a right to sue letter and commenced a private action. The Ninth Circuit reversed the preliminary injunction restraining the employer from discharging the claimant-employee. The Court held (535 F.2d at 1186) that "the initiation of a private action . . . based on the charge [of discrimination] signalled the failure of efforts at conciliation and terminated EEOC's opportunity to bring suit under 42 U.S.C. §2000e-5(f)(1)."*

* The Ninth Circuit subsequently stated, in EEOC v. Occidental Life Ins. Co., 535 F. 2d 533, 536 (9th Cir.), cert. granted, ___ U.S. ___ (Dec. 13, 1976), that "should . . . [a] private action be filed, the EEOC would apparently be restricted to intervention."

The Court also held in Pacific Press that although subsequent charges by these employees were not the subject of their private suit and thus could still form the basis of EEOC action, they were related to the earlier charges and should be dealt with by amendment of the private action, which might thus "resolve the substance of all the charges." Ibid.

The most recent of the decisions of the six Circuits on the question is EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977), in which the EEOC filed suit after two unsuccessful applicants for employment claiming race discrimination had brought private actions against the employer. The EEOC sought to expand the refusal-to-hire issues raised in the private actions by seeking relief against hiring practices thought to have a discriminatory racial effect, such as tests, educational criteria, subjective personnel selection criteria and recruiting methods. The Court held that Congress' expressed desire to prevent multiple, overlapping proceedings based on the same charge of discrimination, as well as the availability of other adequate means for the EEOC to obtain relief in the public interest against related or continuing practices, precluded the maintenance of a second action by the EEOC on the same charge.

First, the Court emphasized that there were two basic kinds of civil actions which the statute authorizes the EEOC to institute to attack employment discrimination. In the Continental Oil case, the EEOC was proceeding, as it is in the present case, under §706. This section, the Court pointed out, "is addressed to vindication of individual instances of employment discrimination. EEOC involvement is initiated by the filing of a specific charge...." (at 887)

The EEOC was not there, and is not here, proceeding under the "pattern or practice" provisions of §707, the aim of which is "eradication of broad based systematic discrimination." The Court summarized the different focuses of the two types of proceedings as follows:

"It was unquestionably the design of Congress in enactment of §707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals. . . . Rather, it is to those individual grievances that Congress addressed §706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when 'reasonable cause' has been found" (at 887, quoting from United States v. Allegheny-Ludlum Industries, Inc. 517 F.2d 826, 843 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976)).

Thus, the only question in Continental Oil, as here, was the authority of the EEOC to "bring a separate civil action under §706(f)(1) on the present facts." (at 886) The problem of duplication is always present when two suits are brought under §706(f)(1) on the same charge, since both the employee and the EEOC are limited in suits under that section to the charge and matters "reasonably related to that charge." (at 889)

The Court stated that "Congress was aware of this potential problem and provided a method to avoid duplicitous actions ... when one of the parties sues, the other is limited to possible participation only through intervention." (at 889, quoting from EEOC v. Duval Corp., 528 F.2d 945, 948-949 (10th Cir. 1976)). The Court found that "the statutory provision for intervention must be read as the exclusive procedure by which the EEOC may participate in a previously filed private lawsuit under §706(f)(1) in order to give it significance. Allowing a second suit to proceed on the charge would emasculate the provision." (at 889-890)

The Court also dealt with the specific situation involved in the present case, where the EEOC delayed so long that it lost the opportunity to intervene by reason of the settlement of the private action. Even in that case, adequate

protection of the public interest remains. Thus, the Court said:

"If there are additional incidents of discrimination and the EEOC has foregone its opportunities to address them in a suit filed on a particular charge, additional charges may be obtained upon which to proceed. Further, if the additional incidents sought to be addressed are pervasive, the matter could be certified for §707 processing, which section affords a broad based remedy without regard to individual charges or complaints." (at 890)

In relegating the EEOC, in part, to reliance on "additional charges" the Court was not depriving it of any initiative to bring suit. Charges may be filed by a member of the Commission as well as by any employee aggrieved by an act of discrimination, §706(b). Nor is the use of Commissioners' charges extraordinary. See, e.g., New Orleans Public Service, Inc. v. Brown, 507 F.2d 160 (5th Cir. 1975); U.S. Steel Corp. v. United States, 477 F.2d 925 (10th Cir. 1973); Sparton Southwest, Inc. v. EEOC, 461 F.2d 1055 (10th Cir. 1972); Local 104, Sheet Metal Workers v. EEOC, 439 F.2d 237 (9th Cir. 1971). Similarly, a §707 pattern or practice suit is wholly within the Commission's control.

The EEOC objected in Continental Oil that disallowing a second lawsuit after a private action has been filed would encourage employers to settle private complaints "to

avoid the spectre of an EEOC action addressing additional incidents of discrimination." (at 890) That is precisely what the EEOC has claimed in this case. In Continental Oil the Court responded to the EEOC's objection as follows:

"In the context of the various procedures by which the EEOC may address those additional incidents of discrimination under the section, this additional impetus for employers or other respondents to settle individual complaints cannot be said to be a harmful result." (at 890-891)

The Court's emphasis in Continental Oil on the need for the settlement of Title VII complaints is of the utmost importance. It was Congress' aim in enacting Title VII to encourage voluntary settlement of disputes involving alleged employment discrimination. "Cooperation and voluntary compliance were selected as the preferred means" for achieving the statutory goal. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); see also Weise v. Syracuse University, 522 F.2d 397, 412 (2d Cir. 1975).

The importance to Congress of voluntary settlements is manifest throughout the statutory provisions. As a jurisdictional prerequisite to any suit, the EEOC is, for example, required by §706(b) of Title VII to "endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." After

Title VII litigation is commenced, the Court is specifically authorized by §706(f)(1) to stay proceedings pending further efforts "to obtain voluntary compliance."

It will be an enormous impediment to the resolution of Title VII disputes if the individual claiming to be aggrieved cannot, after waiting futilely for EEOC action on his behalf, control and settle his own private action. Compare EEOC v. North Hills Passavant Hospital, 544 F.2d 664 (3d Cir. 1976). The employee's ability to settle with his employer is dependent on his ability to furnish a reliable termination of the controversy.*

The EEOC has stated that it presently has a backlog of more than 100,000 pending complaints. If employers are to be encouraged to settle Title VII disputes, this Court must make it clear that the statute does not permit the EEOC to bring a lawsuit after the settlement of the private action.

* It is for this reason that the Sixth Circuit was, we submit, clearly wrong in relying, as one ground for permitting a second action, on the EEOC's refusal to consent, at the request of the employee, to the settlement of his charge in EEOC v. McLean Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975).

The Decisions Allowing the EEOC to
Maintain a Second Action Based on
the Same Charge of Discrimination

The decision upon which the lower court placed the most reliance is EEOC v. Kimberly-Clark Corp., 511 F.2d 1352 (6th Cir.), cert. denied, 423 U.S. 994 (1975). In that case, the Court recognized the statutory prohibition against duplicative Title VII proceedings, but restricted it to the narrow, probably non-existent situation in which the EEOC's action is one "raising no substantially different issues and seeking no relief other than for the private party." 511 F.2d at 1363.

The Fifth Circuit adopted the same limited test of what constitutes "duplicate proceedings" in EEOC v. Huttig Sash & Door Co., 511 F.2d 453, 455 (5th Cir. 1975).

The Tenth Circuit has, since these cases, joined the Eighth Circuit in rejecting such a standard and has explicitly refused to follow these decisions on the ground that nothing in Title VII's prohibition against multiple suits permits its easy evasion by varying the allegations of the complaint or the demand for relief. In Continental Oil, the Tenth Circuit stated:

"According to the cited Fifth and Sixth Circuit cases, if the EEOC suit is broader

in scope, the EEOC suit may be allowed to proceed in spite of the previously filed private action. As we are unable to find within the language of the statute any basis for defining the right of the EEOC to sue in terms of the scope of this suit, we reject that construction of the section." (at 889)

Despite its agreement in result with the Fifth and Sixth Circuits, the Third Circuit noted, but apparently rejected, their position that differences in "allegations and relief" will permit the second suit. The Court observed that under this test the EEOC is not barred "even though the factual foundations of the two suits are virtually identical." EEOC v. North Hills Passavant Hospital, supra, 544 F.2d at 668 n. 8.

Allowing the EEOC to relitigate a charge of discrimination merely because there may be some significant differences in the issues raised or in its claim for relief would give rise to a whole host of difficulties.

If, for example, the employee in the private action sought only limited equitable relief or settled without obtaining all the injunctive relief he originally sought, may the EEOC nevertheless bring an action going over the same ground in order to obtain the relief it deems adequate? Similarly, if the employee decided that not all the

matters raised by the EEOC in its investigation and findings of reasonable cause -- although necessarily related to his charge in order to be the subject of suit at all -- have sufficient likelihood of success or importance to him for him to assume the burden of litigating them (in addition to those matters which are his primary concern) may the EEOC bring its own suit to raise these related issues? If the employee raised such issues, but settled without obtaining relief or as much relief as the EEOC would like, must the defendant-employer be put to the burden of relitigating the issue despite the Congressional policy against such duplication?

Any attempt to dissect the issues and claims for relief which may be litigated with respect to a single charge must necessarily involve multiple, overlapping litigation which Congress intended to prevent and which, as the numerous remedies afforded the EEOC under Title VII show, is wholly unnecessary to enable it to protect the public interest. The District Court here erred in holding that the EEOC suit may be maintained because it was not "co-terminous" with the private action (79a).

The second ground for the District Court's decision, which was also the basis for the Fifth and Sixth Circuit

decisions in Huttig and McLean, supra, was its conclusion that a prior private action bars a second EEOC action only as long as the private action remains pending and that, upon its termination, the EEOC becomes free to do what it could not do before, institute an independent second action. Both the Fifth and Sixth Circuits were concerned that if there were no other actions pending in which the EEOC could seek permissive intervention, the EEOC would lose the ability to obtain relief in the public interest against discriminatory acts or practices not remedied in the private action. Thus, in McLean, the Sixth Circuit stated:

"If EEOC's present action should be dismissed, there is no other action pending in the district court for enforcement of Title VII rights in which EEOC could seek permissive intervention." (525 F.2d at 1011)

Similarly, the Fifth Circuit in Huttig was concerned that the EEOC, having uncovered additional discriminatory practices in the course of its investigation of the employee's charge, would "be prevented from taking appropriate action on those newly discovered practices simply because the charging party settles his suit with the employer." (511 F.2d at 455)

The Court recognized that if the EEOC could bring suit while the private action is pending "there would be two lawsuits proceeding through the courts simultaneously and dealing with identical or certainly similar issues." (Ibid., emphasis added.) In its view, however, if the two related actions are not proceeding simultaneously, there is no duplication within the prohibition of Title VII. The Court said:

"... if the private suit has already been terminated (as is our situation), there would not be duplicative suits before the courts." (at 455)

We submit that the burden on an employer of defending multiple litigations "dealing with identical or certainly similar issues" is equally great whether the suits are brought simultaneously or consecutively. The effect of interfering with the private employee's right to settle his claim in order to obtain prompt relief is, moreover, no less merely because the EEOC must wait in the wings until the private action is completed before commencing another action. In neither case can the employee effectively prevent further litigation on his claim in order to obtain relief by way of settlement.

Permitting the EEOC to institute a second action

once the private action has terminated also has the undesirable effect of encouraging administrative delay and evasion of the statute. The EEOC is barred from instituting a second action while the private suit is pending, and may intervene therein only if and to the extent that the District Court permits, and only in cases of general public importance. Under the Fifth and Sixth Circuit's decisions, all the EEOC has to do to free itself of the statutory restraints is to wait long enough for the private suit to terminate. Given the EEOC's position that laches and the statute of limitations are unavailable against it, it would have ever, n to do so and then file a second action merely varying the issues and requested relief sufficiently so that they are not substantially identical.

The basic defect in the concern of the Fifth and Sixth Circuits with the EEOC's inability to intervene in the private action once it has terminated, is that they appeared wholly unaware, or at least gave no consideration to, the other remedies available to the EEOC when the private party fails to obtain adequate relief against related or continuing practices affecting others. As the Tenth Circuit held in Continental Oil, duplication can be avoided and the public interest still protected by preventing re-

litigation of a charge which has once been the subject of a suit, and by encouraging the Commission to follow the prescribed statutory procedures for the redress of other practices warranting its attention.

The third decision permitting a second action is EEOC v. North Hills Passavant Hospital, 544 F.2d 664 (3d Cir. 1976), but its rationale is such that it probably supports a contrary position on the facts of this case.

The Third Circuit pointed out that the statute contains no "explicit qualification of the EEOC's general authority to sue" whether or not a private suit has already been instituted. Any such qualification, the Court said, "must be implied from the limited right of permissive intervention afforded to the EEOC with respect to private suits." (at 668) Such an implication, the Court found, was usually derived by other courts from the legislative history and the Congressional concern over duplicative suits that other courts had found therein.

After an extensive review of the legislative history, the Third Circuit concluded that such concern was voiced only while the bills under consideration vested

administrative cease-and-desist authority in the EEOC, and was based on the inability to consolidate an EEOC administrative proceeding with a private judicial action. Once the bill had been amended to substitute an EEOC-initiated judicial action for its administrative authority, the Court said, there was no evidence of Congressional concern over multiple litigation because Congress knew that such problems could be adequately resolved by consolidation of the pending actions pursuant to Rule 42(a). Thus, the Court stated:

"The problems which may arise from duplicative administrative and judicial proceedings are entirely different from those which may be created by the duplication of separate law suits. Rule 42(a), Fed. R. Civ. P., provides an adequate procedure for dealing with the problems associated with duplicative law suits. There is, however, no provision for the consolidation of an administrative proceeding with a law suit. Congress, we assume, was well aware of this distinction in 1971 when the House and Senate Reports explicitly prohibited duplicative administrative and judicial proceedings which might arise as a result of granting the EEOC cease and desist authority. The above quoted language from these Reports is, however, of little relevance in interpreting the limits upon the EEOC's power to institute suits in federal trial court pursuant to §706(f)(1)." (at 670)

The Third Circuit thus relied entirely on con-

solidation as the remedy for duplication. It said:

"Any burden arising from the fact that Pope's lawsuit is also pending against the same defendant can be resolved in proceedings under Fed. R. Civ. P. 42(a)." (at 672)

The Third Circuit did not, of course, deal with the situation presented here, in which the private action had terminated long before the EEOC commenced suit. In view of its total reliance on consolidation to resolve the problem of duplication, however, one may hazard the guess that the Third Circuit would reach a different result where the EEOC has delayed so long that the private party not only acquired the right to bring his own proceeding to escape the consequences of administrative delay, but that action was litigated for 1 1/2 years and ultimately settled, before the EEOC acted. The Commission's delay deprives the defendant-employer of the ability to obtain protection against multiple litigation through consolidation as contemplated by the Third Circuit. Permitting the EEOC to commence litigation anew would contravene the Congressional premise that duplication would not be a problem once the administrative-judicial bifurcation had been eliminated.

Permitting a second action here will not prevent

the Commission from terminating objectionable employment practices which it has no other means to prevent. What is at stake here is the effort on the part of the EEOC to use an ancient charge, already the subject of litigation, to evade the statute of limitations and create extensive back pay liability arising solely out of its own delay in acting on the charge. (See pp. 7-8, supra.) As the Supreme Court said in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 467 n. 13 (1975), in enforcing the statute of limitations in one of the civil rights statutes:*

"We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. If the respondents, or any of them, presently are actually engaged in such conduct, there necessarily will be claimants who are in a position now either to file a charge under Title VII or to sue under §1981. The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his §1981 claim in the federal court."

D.

Laches

If this Court were to hold, as the District Court did, that the fact that the private action is no longer

* See also EEOC v. Bailey Co., 12 FEP Cases 623, 626 (M.D. Tenn. 1975).

pending subjects the Company to the burden of multiple litigation, the question of laches should be considered.* It is the EEOC's extraordinary delay which resulted in the prejudice to the Company of multiple litigation. If the Commission had brought suit at any time while the employee's suit, of which it was fully aware, was pending, presumably the two actions would have been consolidated, or the EEOC action would have been dismissed and the EEOC remitted to the remedy of intervention. In either event, the Company would have been relieved of the burdens of multiple litigation.

Although the charge of discrimination, filed in June, 1971, had been pending with the Commission for almost four years before the private action ended in May, 1975, the EEOC did not bring suit prior to its termination or for almost a year thereafter. During the period of the EEOC's delay, the Company not only lost the right to avoid

* This Court's jurisdiction to hear such a related issue on this appeal is clear. Green v. Wolf Corp., 406 F.2d 291, 302 (2d Cir. 1968), cert. denied, 395 U.S. 977 (1969); Garber v. Randell, 477 F.2d 711, 715 (2d Cir. 1973). See also Deckert v. Independence Shares Corp., 311 U.S. 282, 286-287 (1940); Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1201 (2d Cir. 1970).

multiple litigation on the same charge, but entered into a settlement with the employee involved and thus disposed of the claim based on his charge -- something it would not have done if it would not have resulted in an end to the litigation.

Such prejudice to defendant warrants dismissal of the complaint for laches, which defense has been held available against the Commission both as to injunctive and monetary relief. United States v. Georgia Power Co., 474 F.2d 906, 923 (5th Cir. 1973); EEOC v. Griffin Wheel Co., 511 F.2d 456, 459 n.5 (5th Cir. 1975); EEOC v. C&D Sportswear Corp., 398 F. Supp. 300, 303 (M.D. Ga. 1975).

CONCLUSION

The order appealed from should be reversed, with instructions to dismiss the complaint to the extent it is based on the Ferrell charge of discrimination.

Respectfully submitted,

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April 20, 1977

APPENDIX

APPENDIX

Title VII of the Civil Rights Act of 1964, as amended effective March 24, 1972 (P.L. 92-261):

Section 706 of the Act, 42 U.S.C. §2000e-5:

* * * *

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer...has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer ... (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be

filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.... The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission... If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section...or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may in its discretion permit the Commission...to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

* * * *

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the

court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission....

* * * *

Section 707 of the Act, 42 U.S.C. §2000e-6:

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign

the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

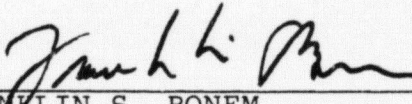
(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of

a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act.

CERTIFICATE OF SERVICE

I am one of the attorneys for appellant.
I hereby certify that two copies of the foregoing
Appellant's Brief have been served by express messenger
on Gary T. Brown, Esq., 3354 Breckenridge Court,
Annandale, Virginia 22003, this 20th day of April,
1977.



FRANKLIN S. BONEM

Ronald J. Copeland
Rec'd 4/20/77